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Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34797

**NEW ENGLAND TRANSRAIL, LLC, D/B/A WILMINGTON AND WOBURN
TERMINAL RAILWAY - PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901
TO ACQUIRE, CONSTRUCT, AND OPERATE AS A RAIL CARRIER ON TRACKS
AND LAND IN WILMINGTON AND WOBURN**

**MOTION TO STRIKE
THE SUPPLEMENTAL FILING OF NEW YORK, SUSQUEHANNA
AND WESTERN RAILWAY CORPORATION,
THE SUPPLEMENTAL COMMENTS OF THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND THE NEW JERSEY MEADOWLANDS,
THE RESPONSE TO SUPPLEMENTAL COMMENTS OF THE NEW YORK,
SUSQUEHANNA AND WESTERN RAILWAY CORPORATION,
AND
COMMENTS OF NEW ENGLAND TRANSRAIL**

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March 20, 2007

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The National Solid Wastes Management Association, the Solid Waste Association of North America and its Massachusetts chapter, the Massachusetts Municipal Association, the Construction Materials Recycling Association, the Integrated Waste Services Association, and New Bedford Waste Services, LLC (collectively, the "Coalition Parties"), through their counsel, respectfully file this Motion to Strike four recent pleadings in Finance Docket No. 34797: (i) the February 21, 2007 Supplemental Filing of New York, Susquehanna and Western Railway Corporation ("NYS&W"); (ii) the March 6, 2007 Supplemental Comments of the New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission ("New Jersey"); (iii) the March 13, 2007 Response to Supplemental Comments of the NYS&W; and (iv) the March 15, 2007 Comments of New England Transrail ("NET")(collectively, the "Ancillary Pleadings").

The Ancillary Pleadings add nothing of value to the instant proceeding and simply cloud the docket with allegations, accusations and assertions of contested facts concerning an entirely separate case which has never been directly before the Surface Transportation Board (the "Board") and has been neither developed nor vetted in this docket to date.

1. NYS&W's Submittal of a Court Decision that is Under Appeal is Irrelevant and Not Material to this Proceeding.

In its February 21, 2007 Supplemental Filing, NYS&W seeks to introduce a recent federal court decision, *NYS&W v. Jackson*, D.N.J. Civ. No. 05-4010, into this proceeding to support an argument in favor of the position it has previously taken in this proceeding. However, the Supplemental Comments submitted by New Jersey, dated March 6, 2007, clearly state that the case is under appeal.¹

Where a District Court decision is actively under appeal and therefore is the subject of ongoing litigation, and where no request has been made by the parties to that litigation – or by the court – for Board involvement in that case, the Board should not consider or rule on the basis of the interim decision on the grounds that the information in the decision is at this time simply not relevant or material.

Indeed, in a recent prior decision involving NYS&W and the Coalition Parties in New Jersey, the Board declined to take action where federal court litigation was proceeding, citing the ongoing litigation where Board involvement had not been requested as one of the bases for its decision. See *NSWMA, et al. - Petition for Declaratory Order*, Finance Docket No. 34776 (STB

¹ New Jersey Supplemental Comments at 1: "NJDEP and NJMC believe that the *Jackson* decision is fundamentally flawed for a number of reasons and inconsistent with the Board's own decisions... and they have filed an appeal with the United States Court of Appeals for the Third Circuit."

served March 10, 2006). Pursuant to 49 CFR § 1104.8, the Board should strike this submittal from the record of this proceeding.

2. New Jersey's Submittal of a Rebuttal to the NYS&W Filing is Also Not Relevant to this Proceeding.

In response to the NYS&W Supplemental Filing, New Jersey submitted brief Supplemental Comments specifically rebutting NYS&W's Supplemental Filing. Because the NYS&W Supplemental Filing is not relevant or material at this time, New Jersey's response is similarly irrelevant and the Board should strike the New Jersey submittal from the record of this proceeding.

3. NYS&W's Submittal of a Response to Supplemental Comments Is an Impermissible Reply and is Further Not Relevant to this Proceeding.

In response to the New Jersey Supplemental Comments, NYS&W submitted a nearly six-page argument relating to *NYS&W v. Jackson* and its view that the District Court's decision would be sustained on appeal. This response must be struck from the record for two reasons.

First, at best, the response is a reply to a reply, which is directly forbidden by the Board's rules of procedure. See 49 CFR § 1104.13(c).

Second, the NYS&W argument is wholly extraneous to the instant proceeding. NYS&W attempts to interject facts and argument that have nothing whatsoever to do with the *New England Transrail* matter. NYS&W asserts its views that NYS&W facilities in New Jersey are not "rogue" facilities, that it has agreed in New Jersey to "substantially 'comply'" with New Jersey's waste rail transfer regulations, that it does not conduct processing in New Jersey, and that it does not present significant threats to public health, safety or the environment in New Jersey. This information is completely irrelevant to the well-developed facts that are currently before the Board in the *New England Transrail* matter.

For the foregoing reasons, the Board should strike the NYS&W Response to the New Jersey Supplemental Comments from the record of this proceeding.

4. NET's Submittal of a Comment Letter Is Objectionable, Untimely and Irrelevant to this Proceeding.

In response to the supplemental submittals discussed above, NET submitted a comment letter dated March 15, 2007 in which it attempts to raise three matters, all of which are improper.

First, NET argues that legislation pending in the U.S. Congress constitutes action by members of Congress that is "threatening" the Board and that "the Board should not consider these threats." This statement is both objectionable and scandalous. To suggest that the legislative process constitutes "threatening" behavior to the Board is simply outrageous. Pursuant to the Board's rules on objectionable and scandalous matters, 49 CFR § 1104.8, this comment should be struck from the record.

Second, NET attempts to reargue its case, citing to its factual record in the proceeding and its interpretation of proposed activities. This reargument is nothing more than a reply to a reply, an improperly timed repeat of arguments previously made, and consequently the Board should strike this from the record. *See* 49 CFR § 1104.13(c).

Third, NET argues that the *NYS&W v. Jackson* decision has precedential value in the instant case, conveniently omitting that the case has been appealed to the Third Circuit Court of Appeals. For the reasons stated above, the Board should not entertain arguments on this decision. Pursuant to 49 CFR § 1104.8, the Board should strike this comment letter.

CONCLUSION

For all of the foregoing reasons, the Coalition Parties respectfully request that the Board strike from the record of this proceeding each of the four Ancillary Pleadings. The existing record in the instant case clearly describes the jurisdictional problems created by NET's attempt

to vertically integrate two separate business activities, and much of the verbiage in the Ancillary Pleadings is an attempt to apply different facts to the current proceeding. In the event the Board disagrees and determines that it wishes to consider the decision issued by the District Court in *NYS&W v. Jackson*, the Coalition Parties request that the Board provide a schedule for submittal of comments on that case so that each of the parties to this proceeding would have a fair opportunity to provide its view of that case to the Board.

There is one issue on which the Coalition Parties and NET are in agreement: the need for the Board to expeditiously act on the critical jurisdictional issue currently pending in this proceeding. The Coalition Parties respectfully request that the Board quickly conclude its deliberations and provide a response to the comments submitted last summer on the jurisdictional issue raised in this case.

DATED: Wellesley, Massachusetts
March 20, 2007

Respectfully submitted,
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and
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and
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2007, I served the foregoing Motion to Strike by causing a copy to be delivered by first class mail, postage prepaid, to the parties listed below.


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